



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2023-034

July 18, 2023

Town of Witless Bay

Summary:

The Complainant submitted an access to information request to the Town of Witless Bay under *the Access to Information and Protection of Privacy Act, 2015* for records relating to a sexual harassment complaint made by the Complainant against an elected official of the Town. The Town refused to provide the records to the Complainant, citing sections 33 (information from a workplace investigation) and 40 (disclosure harmful to personal privacy) of *ATIPPA, 2015*. The Complainant did not agree with the Town's decision and filed a complaint with this Office. The Commissioner concluded that section 33 did not apply to the responsive records but that section 40 applied to some information in the records. The Commissioner recommended that the Town apply the necessary redactions under section 40 and provide the records to the Complainant within 10 business days.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 33 and 40.

Authorities Relied On:

NL OIPC Report [A-2021-025](#).

[Kirby v. Chaulk](#), 2021 NLSC 86.

BACKGROUND

- [1] The Complainant submitted an access to information request under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or the “*Act*”) to the Town of Witless Bay (the “*Town*”) for the following records:

I am seeking emails and/or written records from and between council and staff pertaining to an allegation that [named elected official] breached the Town's sexual harassment policy against employees.

- [2] The Town provide the Complainant with a final response indicating that it was withholding all responsive records in accordance with sections 33 and 40 of the *Act*. The Complainant was not satisfied with this response and made a complaint to this Office.
- [3] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

PUBLIC BODY'S POSITION

- [4] It is the position of the Town that it is required to withhold the records in accordance with section 33 of the *Act*. It noted that the investigation into the harassment complaint is not complete and release of the records could have an impact on the investigation.
- [5] The Town submitted that releasing the requested records would be an unreasonable invasion of the elected official's privacy under section 40 of the *Act*, and could directly hurt the reputation of the person named in the harassment complaint, affecting their personal and professional life.

COMPLAINANT'S POSITION

- [6] The Complainant, as the complainant in both the harassment complaint and this access complaint, submits that they are entitled to receive the requested records.

ISSUES

- [7] Do sections 33 and/or 40 apply to the responsive records?

DECISION

- [8] The first step in determining if section 33 applies to the records is to determine if they meet the definition of a “workplace investigation”. As noted in Report A-2021-025 at paragraph 25:

*A workplace investigation is an investigative process leading to a finding on whether or not there was misconduct on the part of **an employee** in the workplace that may give rise to progressive discipline or corrective action. (emphasis added)*

- [9] The key issue here is the employment status of the named elected official and if they are considered an employee of the Town. The Supreme Court of Newfoundland and Labrador discussed the issue of elected officials’ status as employees for the purposes of *ATIPPA, 2015* in *Kirby v. Chaulk, 2021 NLSC 86*. In its decision, the court stated:

[69] The meaning of employee as it has been interpreted under ATIPPA does not support that it includes elected members to the legislature. Nor does the meaning of “employee” as it has been interpreted under the common law support such an interpretation. When I consider the purposes of ATIPPA, including that it limits access to information where the proper functioning of government is at stake, the extension of the meaning of employee to include elected members of the legislature is strained, at best, and not supportable.

[70] ATIPPA defines “employee” under section 2(i), as it relates to a public body, as “includes a person retained under a contract to perform services for the public body”. Although “member” is not defined under ATIPPA, the Act nonetheless distinguishes between “elected officials” and “employees”. For example, section 3(1)(b) of ATIPPA, in the statement of the purposes of the Act, states:

3. (1) The purpose of this Act is to facilitate democracy through

...

(b) increasing transparency in government and public bodies so that elected officials, officers and employees of public bodies remain accountable; Emphasis added.

[71] *The reference to “elected officials” and “employees” in the statement of purposes of ATIPPA under section 3(1)(b) supports that the legislation distinguishes between these two categories of individuals. The distinction between “elected official”, “officer” and “employee” in the statement of the purposes of Act, also supports that for the purposes of interpretation of the ensuing sections, a distinction is to be made between individuals under the Act that are referred to as “employees” versus an “elected official”. The distinction also supports that the extent to which there may be increased “transparency” in government may depend on whether the subject of the access request is an “employee”, “officer” or “elected official”. What may be appropriate for an employee may not be appropriate for an elected official.*

[10] As such, as an elected official of the Town, ATIPPA, 2015 does not grant the same protections to the named elected official who is the respondent to the harassment investigation as those afforded to an employee. Given that the respondent to the harassment complaint is an elected official, the investigation does not constitute a “workplace investigation” as defined by the Act, and section 33 cannot apply.

[11] Additionally, the Town states that there had not, as of the time of the Complainant’s access request, been an actual investigation into the workplace harassment complaint, and there does not appear to be any “information created or gathered” with respect to the investigation. Therefore, even if the elected official was considered to be an employee under the Act, section 33 would not apply as no actual investigation had taken place at the time of the access request.

[12] Finally, as noted above, the Complainant in the access request is also the complainant in the workplace investigation, and would therefore be considered a party to that investigation. According to section 33(3) of the Act, a party to a workplace investigation is entitled to receive “all relevant information created or gathered for the purpose of a workplace investigation”. As such, if section 33 applied, the Town would be obligated to provide the Complainant with all “relevant information”.

[13] Regarding the application of section 40, the records contain three types of personal information: 1) personal information of the applicant, 2) personal information of members of the Town, and 3) personal information of third parties.

[14] Significant portions of the responsive records originate from or contain the personal information of the Complainant. As per section 40(2)(a) of *ATIPPA, 2015*, it is not considered an unreasonable invasion of privacy to release an applicant's own personal information in response to an access request. As such, no redactions are required with respect to the Complainant's own personal information.

[15] Section 40(2)(f) of the *Act*, states that it is not an unreasonable invasion of personal privacy if the information relates to various individuals' "positions, functions, and remuneration as an officer, employee, or member of a public body". Therefore, the release of such information as work email address, work phone numbers, and similar information is appropriate. There are two instances where the Town should redact the personal information of members of the public body. Those are a personal cell phone number (page 5) and an individual's leave status (page 11).

[16] Finally, there are two references to a third party's residency in the Town and their work history (pages 17 and 18) that meet the requirements of section 40 and the Town will need to redact this information prior to releasing the records.

RECOMMENDATIONS

[17] Under the authority of section 47 of the *Access to Information and Protection of Privacy Act, 2015*, I recommend that the Town of Witless Bay make the recommended redactions under section 40 as noted above in paragraphs 15 and 16, and provide the records to the Complainant within 10 business days.

[18] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Town of Witless Bay must give written notice of his or her decision with respect to these recommendations to the Commissioner and any person who was sent a copy of this Report within 10 business days of receiving this Report.

[19] Dated at St. John's, in the Province of Newfoundland and Labrador, this 18th day of July 2023.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador